

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

GARY D. SANDOW

Claimant

V.

PHILIPS ELECTRONICS NORTH AMERICA

Respondent

AND

TRAVELERS INSURANCE COMPANY

Insurance Carrier

Docket No. 1,012,865

ORDER

Claimant requested review of the December 15, 2015, Review and Modification Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on May 5, 2016.

APPEARANCES

Jan L. Fisher, of Topeka, Kansas, appeared for the claimant. Travis L. Cook, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ concluded the 415 week limitation in K.S.A. 44-510e(a) does not apply to temporary total disability benefits under K.S.A. 44-510c, and the only limitation on temporary total disability benefits is the dollar cap found in K.S.A. 44-510f(a)(2). The ALJ went on to conclude that, as no authorized treating physician took claimant off work, or imposed work restrictions that respondent was unable to accommodate, claimant failed to demonstrate his entitlement to temporary total disability benefits (TTD) for the period from October 27, 2014, through July 27, 2015.

Claimant contends respondent was aware as of March 3, 2015, that claimant's condition was work-related and that Dr. Smith recommended claimant be off work due to the effects of the injury. Claimant contends it is inappropriate to find that he had an obligation to turn in an off-work slip from a doctor and request accommodations when he was not employed and the matter had not been accepted as work-related despite notice being given. Claimant requests the ALJ's Award be reversed and temporary total disability benefits awarded from October 27, 2014, through July 27, 2015.

Respondent argues the ALJ's Award should be affirmed. In the alternative, should the Board find claimant entitled to temporary total disability benefits, it should only be from November 10, 2014, to March 13, 2015.

The issue on appeal is whether claimant is entitled to temporary total disability benefits from October 27, 2014, through July 27, 2015.

FINDINGS OF FACT

The Board finds the Award sets out findings of fact in a detailed and accurate manner, all of which are supported by a preponderance of the credible evidence. As such, the Board finds it is not necessary to repeat those facts in this order and merely adopts that recitation as its own and will refer to the facts as necessary to explain the Board's decision.

On October 13, 2002, claimant suffered a work-related injury to his right leg and hip. Claimant met with Dr. Peterson and Dr. Johnson, underwent surgery and was in the hospital for 8 or 9 days. Claimant's condition developed into deep vein thrombosis (DVT).

On June 1, 2005, claimant was awarded a 22 percent whole body impairment and received 38.43 weeks of temporary total disability compensation. Claimant continued working for respondent, although with limitations. In December 2012, claimant underwent surgery for an unrelated health condition. He had complications and did not return to work until the end of March 2013.

On June 28, 2013, claimant took a vacation to Seattle, Washington. While there, he had trouble with his right ankle when a scab he had for years began to swell and start draining. This problem prevented claimant from being able to walk. Claimant could not recall any incident that would have caused his leg problems while in Seattle. Claimant visited the emergency room twice while in Seattle. The second time claimant was admitted to the ICU with septic shock. Claimant later discovered his infection came from his ankle ulceration. Claimant informed respondent about his problems while in the hospital in Seattle. He also reported that he might need to take additional vacation time because he was unsure how long he would be in the hospital. Claimant ended up using short-term disability. Claimant never returned to work for respondent.

On July 30, 2013, claimant met with David E. Smith, M.D., a general surgeon, at the wound center at Salina Regional Health Center. Dr. Smith examined claimant's right lower extremity and found a venous stasis ulcer. Dr. Smith indicated this is part of an end-stage varicose vein disease. Dr. Smith took claimant off work as of August 1, 2013, for treatment, at which time claimant reported to Dr. Smith that he had not returned to work.

Claimant was diagnosed as healed by November 22, 2013. Dr. Smith indicated it was reasonable for claimant to be off work during the treatment of his wound. Dr. Smith indicated that once the wound is healed, and with some precautions taken, claimant would be able to return to work, although with some restrictions. Claimant was released to return to work without restrictions, but he did not do so.

In November 2013, claimant underwent another unrelated surgery. Claimant was placed on FMLA and later short-term disability and, after six months, went on long-term disability. In July 2014, after claimant had used all of his FMLA and long-term disability, claimant was terminated from his employment with respondent.

Dr. Smith saw claimant again on November 10, 2014, due to the return of the ulcer and continued to treat claimant, including skin grafting, for several months. By December 30, 2014, claimant was reporting much improvement, with a decrease in the wound drainage. As of March 13, 2015, claimant reported no ongoing pain in the ankle and no wound drainage. Claimant had not wrapped the ankle for over two weeks. The April 13, 2015, office note indicated claimant's skin remained sealed and he only experienced discomfort when on his feet for extended periods.

Dr. Smith met with claimant on October 19, 2015. Dr. Smith opined claimant developed an ulcer on his leg related to chronic or venous insufficiency, exacerbated by a history of blood clots in his legs, which alters the flow of blood in the venous system in his legs. Because of the chronic condition, claimant is more susceptible to developing ulcerations on his leg. Dr. Smith hoped that claimant would be able to manage his condition, but he would continue to be at risk for developing further ulcerations. Claimant's condition was considered permanent.

Dr. Smith opined it would be difficult for claimant to work in a job that requires him to be on his feet for long periods of time, and it was recommended claimant limit his standing. Dr. Smith also recommended claimant not sit for long periods of time because of his varicose vein disease and venous insufficiency. He did not rule out claimant working if he were able to change position during the course of the day.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-510c(b)(2) (Furse 2000) states:

(2) Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

Claimant contends he is entitled to TTD from October 27, 2014, through July 27, 2015. Claimant acknowledges he did not see Dr. Smith until November 10, 2014, but testified that he was having problems several weeks before his examination with Dr. Smith. However, claimant's testimony fails to prove he was unable to engage in any type of substantial and gainful employment. Dr. Smith, on the other hand, agreed claimant would be unable to work with the problems diagnosed on November 10, 2014. He also testified claimant's condition with the ulcerated scab on his ankle, stemmed from the DVT condition diagnosed in 2002. He described the condition and the resulting venous status ulcer, as chronic, with acute aggravations.

The Board finds claimant entitled to TTD from November 10, 2014, through April 13, 2015, at which time Dr. Smith found claimant's skin had healed. Claimant's request that he remain on TTD until July 27, 2015, is not supported by this record.

K.S.A. 44-510e(a) (Furse 2000) states:

(a) If the employer and the employee are unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d and amendments thereto, the amount of compensation shall be settled according to the provisions of the workers compensation act as in other cases of disagreement, except that in case of temporary or permanent partial general disability not covered by such schedule, the employee shall receive weekly compensation as determined in this subsection during such period of temporary or permanent partial general disability not exceeding a maximum of 415 weeks. Weekly compensation for temporary partial general disability shall be 66⅔% of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto. Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and

permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. If the employer and the employee are unable to agree upon the employee's functional impairment and if at least two medical opinions based on competent medical evidence disagree as to the percentage of functional impairment, such matter may be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination. The amount of weekly compensation for permanent partial general disability shall be determined as follows:

- (1) Find the payment rate which shall be the lesser of (A) the amount determined by multiplying the average gross weekly wage of the worker prior to such injury by 66⅔% or (B) the maximum provided in K.S.A. 44-510c and amendments thereto;
- (2) find the number of disability weeks payable by subtracting from 415 weeks the total number of weeks of temporary total disability compensation was paid, excluding the first 15 weeks of temporary total disability compensation that was paid, and multiplying the remainder by the percentage of permanent partial general disability as determined under this subsection (a); and
- (3) multiply the number of disability weeks determined in paragraph (2) of this subsection (a) by the payment rate determined in paragraph (1) of this subsection (a).

The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

Respondent contends the limitations contained in K.S.A. 2002 Supp. 44-510e(a) should prohibit claimant from collecting TTD after 415 weeks from the date of the accident. The language of the statute discusses "temporary or permanent partial general disability". There is no discussion of TTD in that statutory provision. The Board adopts the finding by the ALJ that TTD is not statutorily limited to 415 weeks.

The ALJ found no authorized physician had taken claimant off work or imposed temporary work restrictions for the treatment of claimant's venous stasis ulcers, citing K.S.A. 44-510c(b)(2). The Board finds claimant's argument on this issue convincing. Claimant had been terminated several months prior to the November 2014, examination by Dr. Smith. It is not logical for claimant to have to take an off work slip to his employer several months after being terminated, in order to qualify for TTD.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant TTD from November 10, 2014, through April 13, 2015, but affirmed in all other respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Review and Modification Award of Administrative Law Judge Bruce E. Moore dated December 15, 2015, is affirmed in part and modified in part as above noted.

The claimant is entitled to temporary total disability compensation from November 10, 2014, through April 13, 2015, at the rate of \$432.00 per week in the amount of \$9,504.00, all of which is due and owing and ordered paid in one lump sum.

IT IS SO ORDERED.

Dated this _____ day of May, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge